

1 Caroline Tucker, Esq.  
2 Tucker | Pollard  
3 2102 Business Center Dr., Suite 130  
4 Irvine, CA 92612  
5 Office 949-253-5710  
6 Fax 949-269-6401  
7 ctucker@tuckerpollard.com

8 *Attorney for Objector*  
9 DARRIN DUNCAN

10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA  
12 OAKLAND DIVISION

13 IN RE: NATIONAL COLLEGIATE  
14 ATHLETIC ASSOCIATION  
15 ATHLETIC GRANT-IN-AID CAP  
16 ANTITRUST LITIGATION,

No. 4:14-md-2541-CW

**OBJECTOR'S RESPONSE TO**  
**MOTION FOR IMPOSITION OF**  
**APPEAL BOND**

17 This Document Relates to:  
18 ALL ACTIONS EXCEPT  
19 Jenkins v. Nat'l Collegiate Athletic  
20 Ass'n  
21 Case No. 14-cv-0278-CW  
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1 Class Member/Appellant, Darrin Duncan, (“Objector”) opposes the Motion  
2 for Imposition of Appeal Bond against Objector Darrin Duncan and states in  
3 support:

4 **I. This Court has already determined that there is no basis to**  
5 **approve an appeal bond for administrative costs**

6 In its motion for an appeal bond, class counsel uses a lot of space in its  
7 motion to mention how Objector previously filed an objection in a previous  
8 different NCAA and that the district court imposed an appeal bond. *Keller v.*  
9 *Natl. Collegiate Athletic Assn.*, C 09-1967 CW, 2015 WL 6178829 (N.D. Cal.  
10 Oct. 21, 2015). What class counsel glosses over is that this Court ordered \$5,000,  
11 though almost \$90,000 was requested. What class counsel fails to mention is that  
12 this Court accepted the majority of Objector’s arguments and ruled that there  
13 was no basis on which the court may approve an appeal bond for administrative  
14 costs. *Id.* Yet, despite this Court’s express disapproval of administrative costs for  
15 an appeal bond, class counsel has requested this Court to approve administrative  
16 costs in this case. As this Court has previously ordered:

17 Objectors also argue that there is no basis on which the Court may  
18 approve an appeal bond for administrative costs, noting that there is  
19 no statute authorizing the shifting of such costs. Plaintiffs do not argue  
20 that there is such a statute. Instead, they cite various cases in which  
21 administrative costs were included in appeal bonds. However, those  
22 cases do not provide any basis on which this Court can impose an  
23 appeal bond for administrative costs in this case. In *In re Cardizem*  
24 *CD Antitrust Litigation*, 391 F.3d 812 (6th Cir. 2004), the Sixth  
25 Circuit affirmed the imposition of an appeal bond that included  
26 administrative costs. However, the Sixth Circuit panel relied on a  
27 Tennessee statute that authorized an award of “any damages incurred,  
28 including reasonable attorney's fees and costs.” *Id.* at 817 (quoting  
Tenn. Code Ann. § 47-18-109). The three district court cases  
Plaintiffs cite include administrative costs in the amount of the  
appeal bonds imposed but do not cite any statute authorizing the  
recovery of such costs. *See In re Netflix Privacy Litig.*, 2013 WL

6173772, at \*4 (N.D. Cal.); *Miletak v. Allstate Ins. Co.*, 2012 WL 3686785, at \*2 (N.D. Cal.); *Embry v. ACER America Corp.*, 2012 WL 2055030, at \*2 (N.D. Cal.).

Moreover, other courts have noted that there is no statute authorizing administrative expenses as “costs” for purposes of Rule 7 and have accordingly declined to include such costs in appeal bonds. *See, e.g., Tennille v. Western Union Co.*, 774 F.3d 1249, 1255 (10th Cir. 2014) (“Circuit courts, in any event, consistently define ‘costs on appeal’ for Rule 7 purposes as appellate costs expressly provided for by a rule or statute. But Plaintiffs have not identified, nor could we find, any rule or statute that permits them, should they succeed in defending Objectors’ merits appeals, to recover the cost of notifying class members of those merits appeals or to recover the cost of maintaining the class settlement fund pending the merits appeals.”); *Schulken v. Washington Mut. Bank*, 2013 WL 1345716, at \*7-8 (N.D. Cal.) (declining to include administrative costs in appeal bond where “Plaintiffs-Appellees were unable to identify any additional precedent or statutes authorizing administrative expenses as ‘costs’”).

*Azizian* made clear that only those expenses expressly defined as “costs” by a fee-shifting statute are “costs on appeal” for purposes of Rule 7. 499 F.3d at 958. There is no such statute defining administrative expenses related to corresponding with class members and maintaining the settlement website as “costs.” Accordingly, the Court declines to require an appeal bond including the \$83,839 of administrative costs.

*Id.* at \*2. As class counsel still relies on case law instead of statutes as its basis for the Court to impose a bond against Objector, then this Court should deny the appeal bond for all administrative costs.

Additionally, this Court should deny the bond for the stated taxable costs under Rule 39 because class counsel has indicated that it believes that filing additional frivolous motions against Objector are taxable costs. Class counsel has said that they will be “moving to dismiss the appeal and/or moving for summary

1 disposition and moving for monetary sanctions against Duncan.” See Bond  
2 Motion, p. 11. These are not appropriate Rule 39 expenses.

3 Objectors are only responsible for normal “costs” under Rule 39, which  
4 covers “(1) the preparation and transmission of the record, (2) the reporter’s  
5 transcript, if needed to determine the appeal, (3) premiums paid for a supersedeas  
6 bond or other bond to preserve rights pending appeal; and (4) the fee for filing the  
7 notice of appeal.” Fed. R. App. P. 39(e). These “costs” on appeal “rarely exceed  
8 a few hundred dollars when taxed against an appellant. The district court may not  
9 include in an appeal bond any expenses beyond those referenced in Fed. R.App. P.  
10 39 unless such expenses may be shifted pursuant to another statute.” *In re*  
11 *Magsafe Apple Power Adapter Litig.*, 571 Fed. Appx. 560, 563 (9th Cir. 2014).

12 In sum, almost the entire amount of the bond class counsel requests consists  
13 of administration expenses that are not defined by statute or rule as costs and are  
14 therefore not permissible components of an appeal bond under *Azizian*.  
15 Additionally, class counsel has included frivolous motions they intend to file in its  
16 calculation of the \$5,000 of its “taxable costs.” Accordingly, the motion for an  
17 appeal bond should be denied.

18 **II. Objector cannot be required to post a bond for settlement**  
19 **administration associated with a class settlement while an appeal is pending**  
20 **because these expenses are not taxable under a specific statute or rule.**

21 The purpose of an appeal bond is “to ensure payment of costs on appeal.”  
22 Fed. R. App. P. 7; accord *Azizian v. Federated Dept. Stores, Inc.*, 499 F.3d 950,  
23 955 (9th Cir. 2007). Here, class counsel requests a bond of \$78,893.80 to cover  
24 anticipated administrative expenses, costs related to additional notice to the class  
25 (which is an administrative expense), and supposed direct costs. No rule or statute  
26 provides that Objector can be liable for the administrative expense and class  
27 counsel has provided an improper basis for how they arrive for the alleged  
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1 \$5,000.00 costs under Fed. R. App. 39(e). Thus, an appeal bond in this case is not  
2 appropriate.

3 The Ninth Circuit has considered the propriety of imposing an appeal bond  
4 on a class action objector. The court held that “the term ‘costs on appeal’ in Rule  
5 7 includes all expenses defined as ‘costs’ by an applicable fee-shifting statute,”  
6 *Azizian* at 958. The Ninth Circuit’s approach to defining “costs” on appeal is  
7 consistent with the Supreme Court’s repeated admonition that the term “costs” is  
8 not an open-ended invitation for courts to impose whatever expenses they deem  
9 fair, but rather a term of art whose content is bounded by the items specified in  
10 statutes or rules. See *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S.  
11 291, 297 (2006) (holding that, in the Individuals with Disabilities Education Act,  
12 “[t]he use of this term of art [i.e., ‘costs’], rather than a term such as ‘expenses,’  
13 strongly suggests that [the statute’s cost-shifting provision] was not meant to be an  
14 open-ended provision that makes participating States liable for all expenses  
15 incurred by prevailing [plaintiffs]”); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*,  
16 482 U.S. 437, 441-42 (1987) (holding that “costs” as defined in Federal Rule of  
17 Civil Procedure 54 are limited to those specified by statute).

18 Class counsel’s failure to identify a rule or statute that would render  
19 Objector responsible for the administration costs is dispositive of the question  
20 whether a bond maybe required for these costs. Under *Azizian*, a bond cannot be  
21 imposed for costs that cannot be taxed against appellants if they lose on appeal,  
22 499 F.3d at 959, and costs beyond those under Rule 39 cannot be taxed absent  
23 statutory authority. *Id.* at 958.

24 Class counsel cites other non-precedential district court opinion imposing  
25 bonds to cover settlement administration costs. *Plaintiff’s Bond Motion*, page 10  
26 and 11. Unsurprisingly, what class counsel does not mention are the many recent  
27 district court opinions hold that appeal bonds may *not* include settlement  
28 administration costs or delay damages. “Here, Plaintiffs have not cited an

1 applicable fee-shifting statute to justify inclusion of settlement administration  
2 costs in Simpson's appeal bond.” *Low v. Trump U., LLC*, 310CV00940GPCWVG,  
3 2017 WL 2655300, at \*4 (S.D. Cal. June 19, 2017). “Following the rationale of  
4 *Azizian*, courts have declined to include delay costs and administration costs in the  
5 amount of an appeal bond in the absence of an applicable cost-shifting statute.”  
6 *Lerma v. Schiff Nutrition Intl., Inc.*, 11CV1056-MDD, 2016 WL 773219, at \*4  
7 (S.D. Cal. Feb. 29, 2016).

8 Accordingly, because class counsel has not provided any basis for the  
9 imposition of a bond and administrative costs and improperly included additional  
10 motions they intend to file against Objector, counsel has offered no basis for  
11 imposition of a bond. The Court should deny the bond motion.

### 12 **III. The *Azizian* factors should not be considered.**

13 In a case where a bond should be posted, district courts in the Ninth Circuit  
14 consider: (1) the appellant’s financial ability to post a bond; (2) the risk that the  
15 appellant would not pay the appellees’ costs if the appeal loses; and (3) the merits  
16 of the appeal. *Azizian v. Federated Dep’t Stores, Inc.*, 499 F.3d 950, 961 (9th Cir.  
17 2007).

18 Here, this *Azizian* analysis does not apply because Plaintiffs have not  
19 identified any applicable fee-shifting statute, and they have not requested any  
20 “costs” more than a few hundred dollars that are available under Fed. R. App. P.  
21 39(e). If Plaintiffs had requested an amount that is allowable under the statute,  
22 then Objection would find it appropriate to address each factor. However, as the  
23 vast amount of the sum requested by Plaintiffs are administrative expenses which  
24 are not allowable expenses under statute and the remaining amount of supposed  
25 costs are to pay for frivolous and unnecessary motions against Objector, then the  
26 Court should not consider the *Azizian* factors.

**IV. The requested bond is being used for an improper purpose.**

Class counsel has spent many pages of its brief inappropriately attacking both Objector and his attorney. Class counsel has huge financial incentive to discourage an appeal as they will not get paid until the settlement is final.

Not only should the bond motion be rejected on the merits for the reasons explained above, but this Court should reject the improper use of a Rule 7 bond to deter appeals: “Allowing districts court to impose high Rule 7 bonds where the appeals *might* be found frivolous risks impermissibly encumbering appellants’ right to appeal[.]” *Azizian*, 499 F.3d at 961 (citation, internal quotation marks, and source’s alteration marks omitted); *accord In re Am. President Lines, Inc.*, 779 F.2d 714, 718 (D.C. Cir. 1985) (“While, in the federal scheme, appeals found to be frivolous cannot command judicial respect, those possessing merit are normally a matter of right. Courts accordingly must be wary of orders, even those well-meaning, that might impermissibly encumber that right.” (footnotes omitted)); *Clark v. Universal Builders, Inc.*, 501 F.2d 324, 341 (7th Cir. 1974) (“[A]ny attempt by a court at preventing an appeal is unwarranted and cannot be tolerated.”); *see also Vaughn v American Honda Motor*, 507 F.3d 295, 300 (5<sup>th</sup> Cir. 2007) (cautioning that “imposing too great a burden on an objector’s right to appeal may discourage meritorious appeals or tend to insulate a district court’s judgment in approving a class settlement from appellate review” (footnote omitted)).

The availability of an appeal is particularly important for class action objectors, who play a crucial role in the settlement process by speaking for absent class members and ensuring adversarial presentation of issues. “Objectors provide a critically valuable service of providing knowledge from a different point of view [from that of the settling parties.]” *Lane v. Facebook, Inc.*, 696 F.3d 811, 830 (9th Cir. 2012) (Kleinfield, J., dissenting); *see also Reynolds v. Beneficial Nat’l Bank*,

1 288 F.3d 277, 288 (7th Cir. 2002) (Posner, J.) (“It is desirable to have as broad a  
2 range of participants in the fairness hearing as possible because of the risk of  
3 collusion over attorneys’ fees and the terms of settlement generally.”).

4 In short, Objector raised valid objections at the fairness hearing and is  
5 entitled to pursue those objections to their logical conclusion, which includes the  
6 right to appeal and to have the appeal heard, without the threat of having to cover  
7 supposed costs that are not covered by rule or statute by lawyers whose agendas  
8 are not necessarily in the best interests of the class members.

9 The use of appeal bonds to chill the pursuit of legitimate, good-faith appeals  
10 is a practice that this Court should emphatically discourage.

### 11 **CONCLUSION**

12 For the foregoing reasons, the motion to impose an appeal bond should be  
13 denied.

14 Dated: February 12, 2018

15 Respectfully submitted,  
16 /s/ Caroline Tucker  
17 Caroline Tucker, Esq.  
18 Tucker | Pollard  
19 2102 Business Center Dr., Suite 130  
20 Irvine, CA 92612  
21 Office 949-253-5710  
22 Fax 949-269-6401  
23 ctucker@tuckerpollard.com

### 24 **CERTIFICATE OF SERVICE**

25 I hereby certify that a true copy of the foregoing was filed electronically via  
26 CM/ECF on the February 12, 2018 and served by the same means on all counsel of  
27 record.

28 /s/ Caroline Tucker  
Caroline Tucker, Esq.